STATE OF MICHIGAN

COURT OF APPEALS

NEXTEER AUTOMOTIVE CORPORATION, Plaintiff-Appellant, v MANDO AMERICA CORPORATION, TONY DODAK, THEODORE G. SEEGER, TOMY SEBASTIAN, CHRISTIAN ROSS, KEVIN ROSS, ABRAHAM GEBREGERIS, RAMAKRISHNAN RAJA VENKITASUBRAMONY, TROY STRIETER, JEREMY J. WARMBIER, and SCOTT WENDLING, Defendants-Appellees.	FOR PUBLICATION February 11, 2016 9:05 a.m. No. 324463 Saginaw Circuit Court LC No. 13-021401-CK Advance Sheets Version

Before: O'CONNELL, P.J., and OWENS and BECKERING, JJ.

O'CONNELL, P.J.

Plaintiff Nexteer Automotive Corporation (Nexteer) appeals by leave granted the trial court's order compelling arbitration after the court concluded that Nexteer was not prejudiced by the request of defendant Mando America Corporation (Mando) to arbitrate after the parties had stipulated that an arbitration provision was "not applicable." We reverse and remand.

I. FACTUAL BACKGROUND

Nexteer and Mando are both steering system manufacturers. Nexteer and Mando are competitors, but between April 2013 and August 2013, the parties considered operating jointly to sell steering products. The parties each signed a nondisclosure agreement providing that, in the event of conflict, they would arbitrate the dispute in Switzerland. In August 2013, the parties stopped pursuing the joint operation agreement.

In September 2013, a series of Nexteer's high-level employees resigned and began working for Mando. Nexteer contended that the employees had acted in concert to divulge trade secrets to Mando. Each of the individual employees had previously signed employment agreements with Nexteer. The agreements prohibited the employees from disclosing any trade secrets, and for twelve months after ending their employment, from inducing any other

employees to leave Nexteer for another business venture. The employment agreements did not contain arbitration provisions.

Nexteer filed its complaint on November 5, 2013. On November 25, 2013, the parties stipulated to a case management order. In pertinent part, the parties stipulated that "[a]n agreement to arbitrate this controversy . . . exists [but] is not applicable."

In December 2013, Mando moved for summary disposition on a variety of grounds. The trial court granted summary disposition to Mando on many of Nexteer's claims, but several claims remained. In May 2014, Mando filed a motion to compel arbitration on Nexteer's remaining claims.

Nexteer opposed Mando's demand to arbitrate, contending that Mando had waived its right to arbitration when it stipulated to the case management order. At a hearing on the motion, the trial court summarized the conflict as follows: "Can you retract what may or may not be a waiver?" The court further framed the issue as a question whether a party is able to "unwaive" a waiver and "reassert a waived arbitration provision months into a litigation[.]"

Mando contended that even if it waived arbitration, Nexteer was not prejudiced by the request to arbitrate. Nexteer responded that it was prejudiced by the waste of time, money, and discovery. Stating that it was concerned about the effect of "affirmative acknowledgment that the arbitration clause does not apply" and the potential prejudice to Nexteer if Mando was permitted to demand arbitration, the trial court requested supplemental briefing.

Following supplemental briefing, the trial court concluded that Nexteer's claims were arbitrable. It determined that, while the parties had collectively and consciously agreed that the arbitration provision did not apply, Mando had not waived arbitration because the specific language of the order was that arbitration was "not applicable." It also concluded that any prejudice to Nexteer caused by Mando's late request for arbitration did not overcome the presumption in favor of arbitration.

II. STANDARDS OF REVIEW

This Court reviews de novo questions of law, including the existence and enforceability of an arbitration agreement. *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003). We also review de novo "whether the relevant circumstances establish a waiver of the right to arbitration . . . ." *Madison Dist Pub Sch v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). "[W]e review for clear error the trial court's factual determinations regarding the applicable circumstances." *Id*. A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake. *Peters v Gunnell, Inc*, 253 Mich App 211, 221; 655 NW2d 582 (2002).

III. ANALYSIS

Nexteer contends that the trial court erred because Mando's stipulation that the arbitration provision "was not applicable" was an express waiver that prevented Mando from later requesting to arbitrate Nexteer's claims, not an implied waiver that required a showing of prejudice. We agree.

Generally, courts disfavor the waiver of a contractual right to arbitration. *Madison Dist Pub Sch*, 247 Mich App at 588. However, a party may waive any contractual rights, including the right to arbitration. *Joba Constr Co, Inc v Monroe Co Drain Comm'r*, 150 Mich App 173, 178; 388 NW2d 251 (1986). A waiver of the right to arbitration may be express or implied. *Id*.; *Bielski v Wolverine Ins Co*, 379 Mich 280, 286; 150 NW2d 788 (1967).

A waiver is an intentional relinquishment or abandonment of a known right. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003). An affirmative expression of assent constitutes a waiver. *Id*. at 378. In contrast, a failure to timely assert a right constitutes a forfeiture. *Id*. at 379.

"A stipulation is an agreement, admission or concession made by the parties in a legal action with regard to a matter related to the case." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 385; 741 NW2d 61 (2007). To waive a right, the language of a stipulation must show an intent to plainly relinquish that right. *Whitley v Chrysler Corp*, 373 Mich 469, 474; 130 NW2d 26 (1964). However, the use of specific key words is not required to waive a right. See *Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Mich Transp Auth*, 437 Mich 441, 463 n 16; 473 NW2d 249 (1991) (holding that the word "waiver" is not required to waive a right, even when a statute requires "clear and unmistakable" evidence of waiver).

In this case, in November 2013, Mando stipulated that the arbitration provision in the nondisclosure agreement between Nexteer and Mando did not apply to the parties' controversy. The language of the stipulation showed Mando's knowledge of an arbitration provision and a clear expression of intent not to pursue arbitration. We conclude that the trial court erred when it determined that Mando's statement was not an express waiver because the stipulation directly indicated an intent to not pursue arbitration, which was the same right that Mando sought to assert six months later.

Mando contends that in this case it did not know that it had a right to arbitration, so it could not have knowingly relinquished that right. It also contends that holding the parties to case management orders to which the parties agreed early in the proceedings leads to harsh results. These arguments are not persuasive.

Courts have long held parties to agreements they make, regardless of the harshness of the results. See, e.g., *Balogh v Supreme Forest Woodmen Circle*, 284 Mich 700, 707; 280 NW 83 (1938) ("The insured was an able lawyer, and had a large experience in insurance matters and must have understood and appreciated the legal consequences of his act. If he did not, although the result is harsh, we cannot rewrite his contract so as to create a liability where none existed."). In this case, Mando was aware of the arbitration clause in the nondisclosure agreement, and it was aware of Nexteer's general allegations in its complaint. It had the ability to apply the language of the arbitration clause to the complaint in order to decide whether it should pursue arbitration. After stipulating that the arbitration provision did not apply, Mando may not now argue that the arbitration provision does in fact apply.

As an alternative ground for affirmance, Mando contends that even if it waived its right to arbitration, the trial court properly ordered arbitration because its demand to arbitrate did not

prejudice Nexteer. We disagree. A party attempting to enforce an implied waiver must show prejudice:

> The party arguing there has been a waiver of this right bears a heavy burden of proof and must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts. [*Madison Dist Pub Sch*, 247 Mich App at 588 (quotation marks and citations omitted).]

However, where there is an express waiver, the party seeking to enforce the waiver need not show prejudice. See *Quality Prods*, 469 Mich at 378-379 (stating that discussion of implied waivers is unnecessary if an express waiver exists). An implied waiver requires a failure to timely assert a right to arbitrate, coupled with an inconsistent course of conduct. That is not what happened in this case. Here, Mando expressed an explicit intent to not pursue arbitration. Because we conclude that Mando expressly waived its right to arbitration when it stipulated that the arbitration provision did not apply, we do not reach issues of implied waiver and prejudice.

We reverse and remand. As the prevailing party, Nexteer may tax costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Donald S. Owens
/s/ Jane M. Beckering